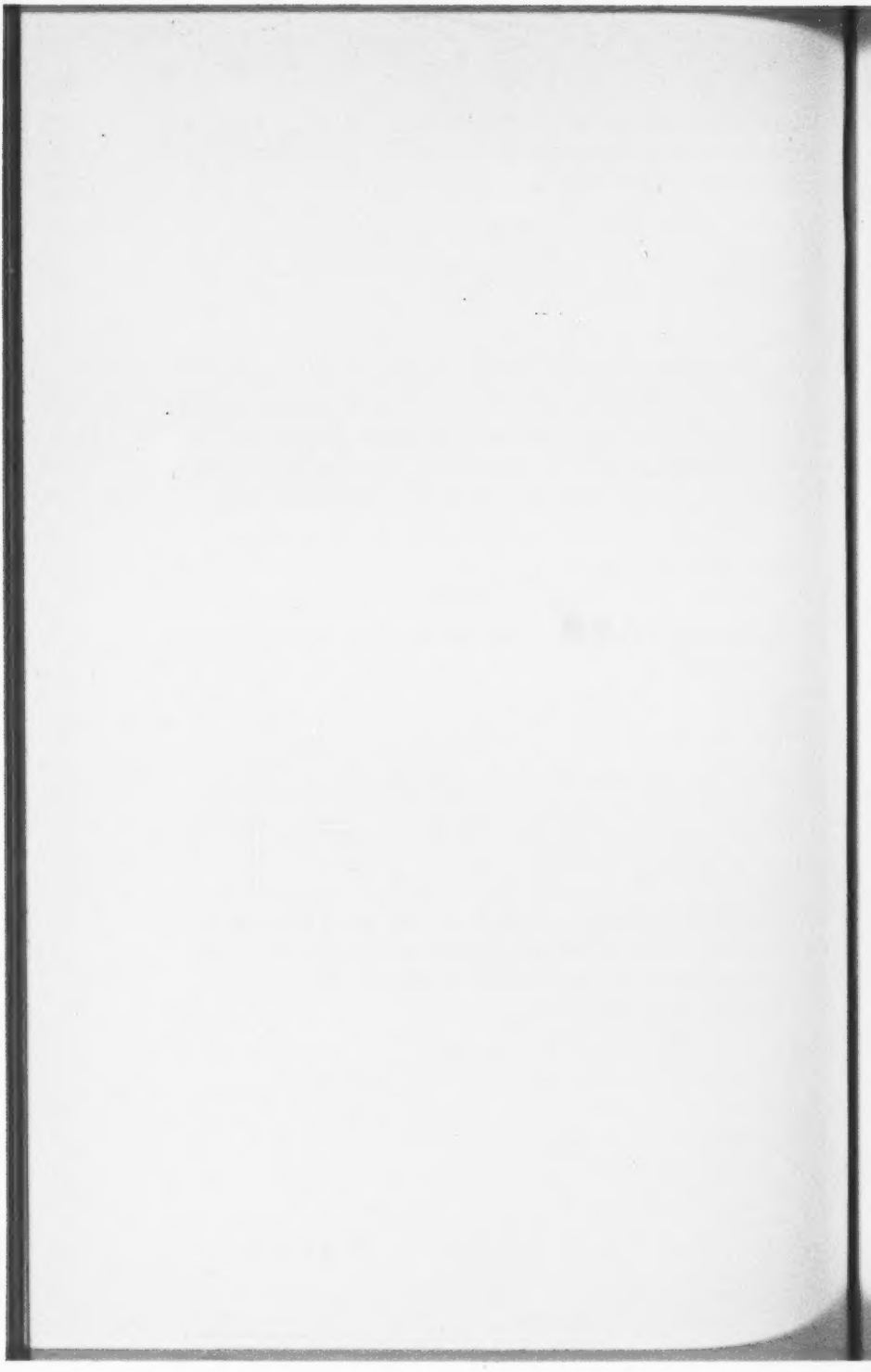

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IN THE

Supreme Court of The United States

OCTOBER TERM, A. D. 1942

No. 573.

CHARLES M. THOMSON, Trustee of the CHICAGO AND NORTH WESTERN RAILWAY COMPANY (substituted for Charles P. Megan, Trustee),

Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,

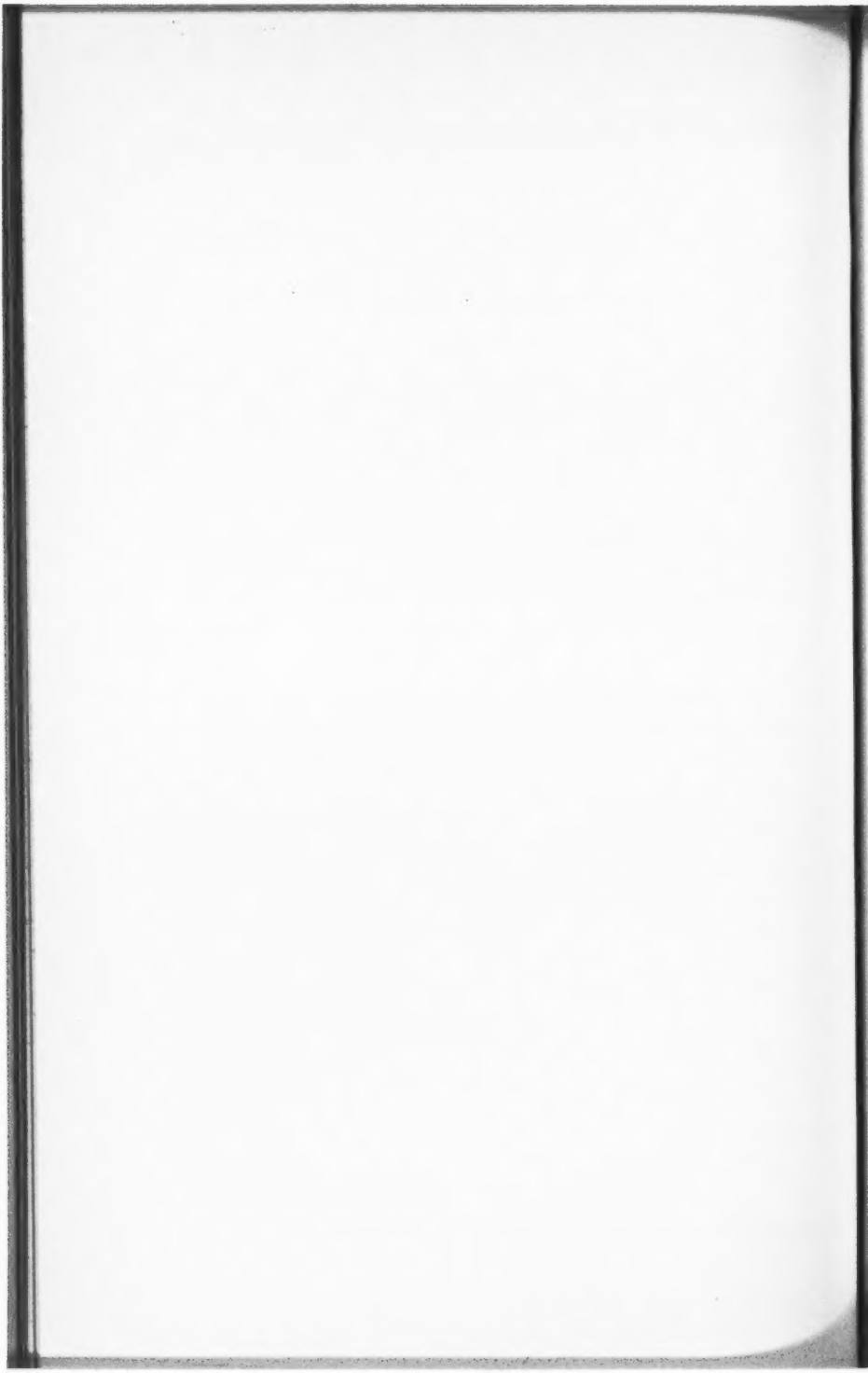
Respondent.

REPLY BRIEF.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Counsel for Petitioner.

DRENNAN J. SLATER,
Of Counsel.

MC CORMICK AND HENDERSON, INC., CHICAGO



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Respondent's attorney has completely ignored the well established proposition of law set out on page 14 of our petition, that if under the evidence a finding of no negligence is as consistent (and certainly more so) as a finding of negligence, no jury question is presented, and it is the duty of the trial judge to direct the verdict.

In lieu of trying to answer this argument, he advances the "reasonable men" rule. As he urges it, the "reasonable men" rule means, not whether there is any evidence of legal weight to sustain the verdict, but whether he has succeeded in so muddying the waters that the supposed

reasonable men are not able to tell whether or not there is any such evidence. He loses sight of the fact that respondent had the burden of proving (a) how the accident happened, (b) that petitioner was negligent, and (c) that such negligence was the proximate cause of the death. He reverses the positions of the parties and says that the burden of proof was on the petitioner to so prove *his* theory of the facts as that "all reasonable men must agree" with it.

Left wholly unanswered is the vital question: Assuming that petitioner's theory is not correct, then where, in this record, is there any proof or inference of negligence on the part of petitioner? Where otherwise is there any proof or inference as to (a) how and when the 36th and 37th cars of this train became separated, (b) how Sevier got between the couplers of those cars, (c) why he went between them, and (d) what created the space between those couplers, if the rear section didn't move faster than the front section after Sevier pulled the pin.

While it was not up to petitioner to prove to the satisfaction of all reasonable minds that the accident happened from any particular cause or in any particular way, petitioner did prove it by undisputed affirmative evidence. The burden of proof was on respondent, and the only charge of negligence upon which she made out a semblance of a prima facie case was that the engineer failed to blow his whistle before backing up in response to Sevier's slack back signal, which depended entirely upon a rule of the company which had no bearing on the case and the violation of which was not a proximate cause of the accident. A reading of respondent's answer amply demonstrates that there is no reasonable inference to support any claim of the respondent. Here is opposed only speculation and conjecture to proved facts and *all* the reasonable infer-

ences. Imagination and sympathy do not support claims of negligence.

On page 3 of respondent's answer it is asserted that the inspection that was to be made by Sevier required not less than ten minutes. This is a plain misstatement of the evidence. The fact of the matter is that Keohane, the conductor, testifying in answer to questions asked by respondent's counsel, had said that an inspection of the whole train would take about ten minutes, and at the end of such an inspection the inspector would report to the conductor. However, both he and the engineer, who had said that deceased got off the engine to make an inspection, amply cleared up any confusion that might reasonably exist between that kind of an inspection and the kind of an inspection which deceased left the locomotive to make on the occasion in question. Although Keohane described a full inspection of the whole train, he also described the kind of an inspection a brakeman would make "when it becomes apparent that the train is about to stall in slowing down, and he gets out of the cab of the engine and he goes back to make an inspection" (R. 73, 77). In such circumstances the brakeman would not inspect all of the brakes back to the caboose. He would inspect them only to the place where he decided to make the separation in the train. It would seem from respondent's brief that her counsel thinks that on the occasion in question in this case, deceased got out of the cab of the engine for the purpose of inspecting the whole train. That he is not justified in any such thought is clear from the testimony of all of the men on the train that each of them knew that the train was about to stall. The contention is contrary to the established fact that Sevier did not inspect farther back than to the point where he did actually prepare to make the cut and then signal the engineer to slack back so that he could complete the cut by uncoupling the cars (R. 77, 81). This, and all of the other

of counsel's contentions, is based upon just such misstatements as this.

On page 3 of respondent's answer an effort is made to charge petitioner with negligence because, before deceased could have completed the inspection of the train and within a few minutes after he got out, the engineer without receiving any signal backed his engine to bunch the slack on the train and attempted unsuccessfully to go forward. What was done at that time can have no bearing on the issues involved. Nevertheless at the bottom of page 3 of the answer, respondent asserts that Sevier uncoupled the cars while the train was thus moving backward immediately after the first time it stalled. It is undisputed that that backward movement was but part of an attempt by the engineer to get the whole train started and "make" the hill without "doubling," that the effort was unsuccessful, and that the following forward movement resulted in gaining only a few feet, when the whole train again stalled (R. 125, 15, last two lines 16, top four lines; 18-19, 20, 26, 28, 44-5, 68-9) "stretched out and taut," in which position it was held for several minutes (R. 125) by the independent engine brake, until Sevier gave the slack-back signal to the engineer. If the pin had been pulled on the first backward movement it would have completed the "cut," and the next forward movement would have been that of the front section only, which *could not have stalled*, but would have gone on its way, as it did after the accident had happened (R. 91, bottom). That the rear section did, at some time, start down hill is not denied. If that did not happen until after Sevier's signal had been given and the engineer had backed the front section against the rear section, then the accident had happened before the rear section started back. This is utterly impossible, for it is undisputed that after the rear section started back and had gone a distance of about half

a car length its automatic brakes were applied, which could not have been brought about by anybody except a *still alive* Sevier (R. 48-9, 50, 55, 77, 78).

On page 4 of the answer respondent argues that the signal given by Sevier was not a backup signal but a "train is parted" signal. The only basis for this argument is that petitioner's engineer is supposed to have testified on his pre-trial deposition that it was his idea that with the modern electric lantern trainmen give the backup signal with arm extended. Although he did not testify that the signal he got from Sevier *was* given with his arm extended, yet counsel for respondent seized upon that testimony and a picture in the rule book as indicating that the train *had* parted. On the trial of the case the engineer appeared in person and testified on the witness stand. His attention was called to his testimony as to his own idea as to how to give a backup signal, and he thereupon testified that at the time he illustrated the backup signal in the giving of his deposition he was seated in a chair at the end of a table with his legs under the table, and that he then and there did actually give a backup signal, but with his arm extended at full length; that he did not give a train has parted signal, and that, in the position he was in, he could not, as a physical proposition, give a "train has parted" signal, which is the indubitable fact. Counsel for respondent knows that the signal illustrated by the engineer, in giving his deposition, was in fact a backup signal, and not a train has parted signal. The engineer further testified, at the trial, that the signal he got from Sevier was a lantern signal; that he could see no part of Sevier's body or arm; that he does not know what the position of his arm or body was; that the signal he gave for respondent's counsel (R. 79) was a backup signal; *that so far as he knows it was given by Sevier exactly in accordance with the picture in*

the Rule Book, Plaintiff's Exhibit D, rule 12-d (R. 80); that the train had *not* parted before that signal was given or at any time after it started up Buda Hill.

If that picture, rule 12-d, requires the back-up signal to be given only at half arm's length it is a rule which is impossible of application at night. It would mean that the receiver (this engineer, for instance) must not act on the signal indicated by the lantern or light unless he can see the giver's arm and be sure that the arm is in the position shown in the picture. If applied in the instant case no cut of the train could have been made until and unless the engineer had first determined the position of Sevier's arm when giving the slack-back signal — a physical impossibility, requiring no argument to demonstrate. It was black dark, Sevier was approximately 1420 feet away from the engineer, and the latter could not see him or his arm or any part of either, but he could, and did, see the signal made by the light, and it was a back-up signal. This is not disputed by any evidence or reasonable inference and is beyond disputed.

The signal "train is parted" means that there has been an accident, that the train has "pulled apart" or "broken in two" without intention, the effect of which is to automatically set the brakes on every car in the train (R. 45, 60, 62, 77, 111, 114, 119). No such thing had occurred. Furthermore, there is no evidence or inference in the record that backing up is not the proper response to a "train is parted" signal.

At the top of page 5 of the answer respondent claims that the testimony shows that the engineer backed up for a distance of some 20 to 60 feet without the application of brakes until he ran into the rear fifty cars of the train on which the automatic brakes had been set. From the outset counsel for respondent has endeavored to create a fog about the engineer's "guess" that the whole backward movement

moved 20 to 60 feet. There is no substance, however, to this argument. The "guess" was given under pressure, after the witness had repeatedly stated that he could not make an estimate of any value. The testimony was:

> "I backed until there was no pull on the drawbars. As to how far back I went it would be only guesswork, because I was busy watching the signal, expected another signal, and it would only be guesswork, only a guess. * * * I continued to watch this lantern that I had seen make the circle. * * * He gives a signal and you act on that signal until you get a different signal. I could give a *guess* on how far back we had gone when we came to a stop, probably from a half to a car length and a half, or 20 to 60 feet." (R. 20, 21.) (Italics ours.)

From this it is seen that as an estimate the guess is such that respondent's counsel has no right to seek to take advantage of it, even though, as a matter of fact it was not such a bad guess. The movement closed up at least 360 inches or 30 feet of slack (R. 118, 125-6), and, after Sevier pulled the pin, almost another 20 feet before he went between the couplers to repair his failure to first set the brakes on the rear section. Add another 10 inches for the slack between the engine and the first car, and the actual *minimum* normal distance of the movement would be 30 feet and 10 inches. It was black dark and the engineer was busy, and he was acting on signals from Sevier, who had full charge, not only of directing the engineer, but of the whole operation of cutting the train in two for doubling it over the hill. In the circumstances, to contend that the engineer should have been put on notice that Sevier was "in a position of danger" because the backward movement was guessed to be from 20 to 60 feet instead of 31 feet is no better than absurd.

On page 5 of the answer counsel calls the court's attention to the fact that deceased was lefthanded, with the ap-

parent intention of making this court believe that the right arm of a left-handed man is perfectly useless; that he is, in effect, a one armed man. Of such stuff is his whole case made.

On page 6 of the answer respondent tries to make out negligence against petitioner by charging that no effort was made by the engineer to apply the brakes on the second backup movement, and repeats this argument on page 10 of the answer by saying that "if petitioner's engineer had backed only the distance necessary to take up the slack to the 36th car and had then applied the automatic brakes and held the slack the deceased would not have been killed." At no time within which the engineer might have applied the brakes and stopped the front section was Sevier in a position of danger. At a matter of law the evidence fails to show, by a preponderance or at all, that ordinary care, or any other degree of care, required or even suggested that the engineer should have set the brakes.

In the ordinary course of a doubling operation, the cut being performed in the usual way, the man making the cut, *cannot*, at any time, be in a position of danger. He cannot *get* between the couplers until he has uncoupled them, and if, before doing that, he has set the brakes on the rear section, he cannot *then* get between the couplers, for his "pulling the pin," merely creates a situation in which the front section can be pulled away from the rear section at the point of the cut; it does not *separate* the couplers at all. It was not until Sevier's light had disappeared, an instant before the front section bumped into and was stopped by the rear section, and had stayed out of sight of the engineer for an unusual length of time, that the engineer was put on notice that something must have gone wrong. Up to then, so far as he could know, everything had been normal and in accordance with the usual procedure. There was nothing

about the distance of the backward movement to excite apprehension on the part of the engineer, for there, all of the time, during all of the movement, was Sevier's light, outside the cars, and the engineer knew that in the usual course of things the man in charge, who was Sevier himself, would give him another signal when it was appropriate and he chose to do so.

Sevier signaled for a slack-back and got it. He was outside the cars and stayed outside until the slack got back to where he had chosen to make the cut, whereupon he uncoupled the cars, and because he had failed to set the brakes on the rear section, that section started down hill and he went between the cars and between the couplers, his lantern or light (which was all of him the engineer could see) disappeared and the front section was stopped by the rear section, which would normally happen when the slack got back to it if the brakes had been set on that section before the uncoupling was made. There was no reason why the engineer *should* have have applied the brakes, and it would not have been possible even for a clairvoyant engineer to do anything to stop after the pin was pulled before the front section caught up with the rear section. Moreover, even though it were physically possible for the engineer to set the brakes on the front section, at any time after the slack-back movement started, there is no evidence at all that if he had done so, after moving back some purely speculative distance, the effect of it would have been to prevent Sevier's being caught between the couplers.

On page 6 of the answer respondent argues that petitioner's rule 14 required that on a slack-back movement three short whistle sounds be given. It would seem to be obvious that petitioner's Rule 14 applies only to a train movement and to be for the benefit of the conductor and

brakeman at the rear of the train. A mere slack-back of the cars in the front section of a doubling operation is no *train* movement, and is not communicated to the cars beyond the point of the "cut," nor felt or seen at the caboose, if the brakes on the rear section are set before the pin is pulled. The lack of a whistle preceding this slack-back cannot possibly have had any causal connection with the death of Sevier. This was a wholly false issue in this case.

On page 6 of respondent's answer the statement is made that men making couplings and making uncouplings go between the cars * * * to manipulate the angle cocks. The reference is to p. 120 of the abstract. But the witness actually said, and the meat of which is omitted by counsel in his answer, that "men making couplings and uncouplings go between the cars * * * to manipulate the angle cock, but only when they are standing still. They would not go in when a train is moving." This matter of the necessity for a brakeman to get his body or part of it between the cars to manipulate the angle cocks is, in fact, so simple that counsel's attempt to fog it is unworthy of attention. Take, for instance, the angle cock at the rear end of the rear car of the front section in this train. It was on the engineer's side of the coupler. The coupler is in the center of the car. The angle cock is between the outside of the side wall of the car and the coupler. No pretense, or claim or suggestion has ever been made by the defendant that a brakeman, standing in the clear of the cars on the engineer's side, would not have to put a part of his body, i. e., his forearm, or perhaps more of his arm, between the *cars*, to reach that angle cock. However, on the other hand, there can be no question whatever as to whether, to reach that angle cock, such a brakeman would have to put his body, or any part of it, between the *couplers* of the cars—he *couldn't* do it while the cars were coupled.

On page 7 of the answer respondent argues that it would be presumed that Sevier exercised due care for his own safety. In this case the so-called "death presumption" did not exist at the close of all of the evidence. As said by the Supreme Court of Illinois in *Nelson* v. *Stutz*, 341 Ill. 387, 397:

> "Presumptions are never indulged where established facts exist. * * * when evidence is produced which is contrary to the presumption, the presumption vanishes entirely."

At the top of page 10 of the answer respondent again argues that there was negligence because the movement was made without warning, and ignores the argument on page 17 of petitioner's brief that as a matter of law there is no duty on the part of an employer to warn his employee of something he knows all about, and that failure to warn in such a situation is not actionable negligence. Obviously, exactly the same thing would have happened if the engineer had whistled—whistling would not have set the brakes on the rear section; would not have prevented Sevier's pulling the pin, or have made him set the brakes on the front section before going between the couplers. He couldn't uncouple until the slack got back to where he was, and the evidence is undisputed that he did uncouple, which completely disposes of any claim that lack of a whistle signal had any causal connection with the accident.

On page 10 of the answer respondent finally argues that the jury would have been justified in refusing to believe that petitioner's engineer saw any back up signal. It is to be noted that the engineer was called as respondent's own witness and respondent relied on him to make out a prima facie case. Counsel is in no position to ask to eliminate the

important and controlling parts of the testimony of this witness and to assume a state of facts not warranted by the evidence.

CONCLUSION.

What this court said in *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343, is here appropriate:

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasant* v. *Fant*, 22 Wall. 116, 120-121. And where the evidence is 'so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660."

Respectfully submitted,

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